Supreme Court, U.S.
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No. 90-50

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ELLIS GREGORY, JR. and ANTHONY P. NUGENT, JR., Judges,
Petitioners,

v.

JOHN D. ASHCROFT, Governor of the State of Missouri,
Respondent.

On Writ Of Certiorari To The United States
Court Of Appeals For The Eighth Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JULY 3, 1990
CERTIORARI GRANTED NOVEMBER 26, 1990

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Relevant Docket Entries

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

NO. 88-0221-C-3

February 4, 1988	Complaint filed
July 20, 1988	Motion for leave to file supplemental complaint filed with memorandum in support
July 22, 1988	Supplemental complaint filed
October 19, 1988	Motion to dismiss filed with memo in support
March 31, 1989	Letter from Judge Hungate to EEOC filed
April 12, 1989	Letter from EEOC to Judge Hungate filed
July 14, 1989	Defendant's answers to interrogatories filed
July 14, 1989	Order granting motion to dismiss filed
August 7, 1989	Notice of Appeal filed

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-2360EM

August 23, 1989	Expedited Briefing Schedule filed
September 15, 1989	Brief for the Appellants and Joint Appendix filed
September 15, 1989	Brief for the EEOC as amicus curiae filed
October 13, 1989	Brief for Appellee filed
October 23, 1989	Reply Brief filed
March 5, 1990	Opinion and Judgment of Court of Appeals entered

May 24, 1990	Time for filing petition for writ of certiorari extended by Justice Blackmun to July 3, 1990
July 3, 1990	Petition for a writ of certiorari filed
November 26, 1990	Petition for a writ of certiorari granted

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Cause No. 88-0221-C-3

THE HONORABLE ELLIS GREGORY, JR.,
THE HONORABLE ANTHONY P. NUGENT, JR.
THE HONORABLE DOUGLAS W. GREENE, and
THE HONORABLE FLAKE L. MCHANEY,
Plaintiffs,

v.

THE HONORABLE JOHN D. ASHCROFT,
Defendant.

SUPPLEMENTAL COMPLAINT

Come now plaintiffs, by and through their attorneys, and as and for their cause of action against defendant allege and state as follows:

JURISDICTION

1. This action is brought under the Declaratory Judgment Act, 28 U.S.C. 2201. Jurisdiction of this Court is founded upon the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621-634, as amended by Public Law 99-592 (effective January 1, 1987) and upon Amendment XIV of the United States Constitution.

PARTIES

2. Plaintiff Ellis Gregory, Jr. is an Associate Judge of the Twenty-First Judicial Circuit of Missouri, and is a resident of and performs his official duties in the Eastern District of Missouri.

3. Plaintiff Anthony P. Nugent, Jr is a Judge of the Missouri Court of Appeals, Western District, and is a resident of and performs his official duties in the Western District of Missouri.

4. Plaintiff Douglas W. Greene is a Judge of the Missouri Court of

Appeals, Southern District, and is a resident of and performs his official duties in the Southern District of Missouri.

5. Plaintiff Flake L. McHaney is a Judge of the Thirty-Fifth Circuit of Missouri, and is a resident of and performs his official duties in the Eastern District of Missouri.

6. Defendant John D. Ashcroft is Governor of the State of Missouri.

BACKGROUND

7. Plaintiff Ellis Gregory, Jr. ("Gregory") was born on May 5, 1927 and has served continuously as a Judge of the State of Missouri since 1978.

8. Anthony P. Nugent, Jr. ("Nugent") was born on December 6, 1920 and has served continuously as a Judge of the State of Missouri since 1981.

9. Plaintiff Douglas W. Greene ("Greene") was born on March 18, 1920 and has served continuously as a Judge of the State of Missouri since 1979.

10. Plaintiff Flake L. McHaney ("McHaney") was born on September 25, 1920 and has served continuously as a Judge of the State of Missouri since 1973.

11. Each of the plaintiffs is in good physical and mental health, has long and exemplary tenure as a judicial officer of the State of Missouri, and is eminently qualified to perform the duties of judicial office.

12. State Court Judges in Missouri are by the laws of the state divided into two categories. In one, the Judge is nominated through election in the state partisan primary elections and elected in the state partisan general elections, as are all other elected state officials. The second category are those Judges whose offices are part of the Missouri nonpartisan selection of judges plan, a plan which was a revolutionary alteration of the pattern of electing State Judges in this country. Judges under the Missouri non-partisan plan are selected to hold office by the Governor of Missouri, his selection being made from

a panel of three qualified persons chosen by a Missouri Nonpartisan Judicial Commission. Missouri Constitution Article V, 25(a).

13. Plaintiffs Gregory, Nugent and Greene each attained judicial office by appointment by the Governor or, after initial selection by and approval of a Missouri Nonpartisan Judicial Commission, by appointment by the Governor. Missouri Constitution Article V, § 25(a). As such, plaintiffs Gregory, Nugent and Greene were not selected for office by election.

14. Plaintiff McHaney, after initially filling the vacancy of an unexpired term of office for Judge of the 35th Judicial District in 1973, has been elected to that office in the general election every six years since the end of that unexpired term.

15. Article V, § 26 of the Missouri Constitution provides, in pertinent part: "1. All judges other than municipal judges shall retire at the age of 70 years."

16. Accordingly, each of the plaintiffs may be forced to retire upon achieving the age of seventy if defendant attempts to enforce the above-mentioned Constitutional provision.

17. Moreover, on or about June 23, 1988, defendant signed into law Senate Bill No. 425, which reads in pertinent part:

> Section 3. Except as provided in subsection 24 of section 27 of article V of the Missouri constitution, any judge who becomes eligible after the effective date of this section for annual compensation, salary or retirement compensation pursuant to sections 476.450 to 476. 595, RSMo, but fails to retire on or before his seventieth birthday shall automatically waive all such annual compensation, salary and retirement compensation.

18. Each of the named plaintiffs will become eligible after the effective date of the above-cited section for annual compensation, salary or retirement compensation pursuant to sections 476.450 to 476.595 RSMo. Thus, plaintiffs will be forced to retire at age seventy or will automatically waive any annual compensation, salary or

retirement compensation to which they would each be otherwise entitled.

19. Plaintiffs Gregory, Nugent and Greene, as well as others unnamed who similarly serve as non-elected judges, and plaintiff McHaney, as well as others unnamed who similarly serve as elected judges, are denied the present right to make plans for their careers due to the doubt and uncertainty of the legality of this mandatory retirement age, and that denial is now and will continue to be a source of irreparable harm to these plaintiffs, for which they have no adequate remedy at law.

20. The forced judicial retirement provision of the Missouri Constitution arbitrarily deprives Missouri Judges of their employment solely on the basis of age, rather than on the basis of any rational test of physical, mental or professional ability, contrary to the prevailing public policy in the United States.

21. If, pursuant to the mandatory retirement provisions of the Missouri Constitution, the office of any judge serving under the nonpartisan court plan should be declared to be open due to the age of the judge without the consent of that judge, that vacancy would not be filled until the Governor selected one person from a panel chosen by a judicial commission. In addition, by virtue of his office the Governor is committed to the enforcement of the Missouri Constitution, including that provision mandating retirement of all judges solely on the basis of age. The Governor of Missouri, therefore has the sole and final authority to enforce the constitutional retirement provision. Thus, an actual controversy exists between the plaintiff judges and the defendant Governor.

22. A less intrusive and more rational basis for retiring judges who, due to age, are physically or mentally incapable of performing the duties of their office already exists in Missouri Constitution V, § 24.

23. Over a period of many decades, a system of forced retirement based solely on age became an ingrained part of both public and private employment practice in this country. This age discrimination in employment came to be recognized as a national tragedy which

represented a great waste of one of our most precious resources, the talent and accumulated experience of older workers, in both public and private employment.

24. Judges are, with possible exceptions not here relevant, the only public servants, employees or officers except those subject to hazardous duties who continue to be subject to mandatory retirement based solely on age.

COUNT I

Come now plaintiffs Gregory, Nugent and Greene, and for Count I of their amended complaint, state as follows:

25. Paragraphs 1 through 24 are realleged and reasserted as if fully set forth herein.

26. The Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621, et seq. ("ADEA"), prohibits employers from terminating the employment of any individual over 40 years of age based upon that individual's age. 29 U.S.C. § 623(a) and § 631(a), as amended by Public Law 99-592 (effective January 1, 1987).

27. The State of Missouri is an "employer" within the definition of the ADEA. 29 U.S.C. § 630(b).

28. Plaintiffs Gregory, Nugent and Greene are "employees" within the definition of the ADEA. 29 U.S.C. § 630(f).

29. Because Article V, § 26 of the Missouri Constitution mandates the retirement of judges based solely upon their age, such provision violates the ADEA.

30. Exhaustion of administrative remedies is inappropriate in this matter because, as yet, none of the plaintiffs has attained the aforementioned mandatory retirement age. Additionally, exhaustion of administrative remedies is unnecessary because it is clear that administrative action cannot afford the relief sought herein.

WHEREFORE, plaintiffs Gregory, Nugent and Greene demand judgment declaring their rights as guaranteed by the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634, nullifying and declaring unenforceable those Missouri Constitutional provisions which force judicial retirement solely by virtue of age and Section 3 of Senate Bill No. 425; for preliminary and permanent injunctions, enjoining defendant from enforcing those Missouri Constitutional provisions which force judicial retirement solely by virtue of age and Section 3 of Senate Bill No. 425; and for such other relief as the Court may deem appropriate.

COUNT II

Come now each of the named plaintiffs, for themselves and all others similarly situated, and for Count II of their amended complaint, state as follows:

31. Plaintiffs reallege and reassert paragraphs 1 through 24 above.

32. The Missouri Constitutional requirement of mandatory retirement of judges at age seventy is arbitrary and has no rational basis and, thus, violates the due process protection of the United States Constitution, Amendment XIV.

33. The Missouri Constitutional requirement of mandatory retirement of judges at age seventy also unfairly discriminates against judges because other state officials are not similarly required to retire at age seventy, thus violating the Equal Protection of Laws guaranteed by the United States Constitution, Amendment XIV.

34. In the history of the State of Missouri, compulsory retirement was consistent with now obsolete social patterns which mandated the retirement of most employees at a given age. In the changing social environment of the nation and in accord with national policy and law, mandatory retirement in most areas of employment has been eliminated voluntarily or is now proscribed by federal law. Currently, the State of Missouri imposes mandatory retirement only upon judges and certain others who hold exceptionally dangerous, physical positions. Mandatory judicial retirement exists in Missouri not as a part of an

overall plan for retirement of those who serve the state but as an unique remainder of an obsolete scheme of retirement reflecting an ancient, illogical and now repudiated policy. It reflects no visible state policy, is violative of national purpose, is arbitrary, capricious and unreasonable and is, therefore, unconstitutional.

WHEREFORE, plaintiffs demand judgment declaring their rights to due process of law and of equal protection under the laws as guaranteed by Amendment XIV of the United States Constitution by nullifying and making unenforceable those Missouri Constitutional provisions which force judicial retirement solely by virtue of age and Section 3 of Senate Bill No. 425; for preliminary and permanent injunctions, enjoining defendant from enforcing those Missouri Constitutional provisions which force judicial retirement solely by virtue of age and Section 3 of Senate Bill No. 425, and for such other relief as the Court may deem appropriate.

(Signatures and certificate of service omitted in printing)

IN THE
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Title omitted in printing)

MOTION TO DISMISS

Comes now the defendant in the above-referenced legal proceeding, the Honorable John D. Ashcroft, Governor of the State of Missouri, and, pursuant to the provisions of Rule 12, Federal Rules of Civil Procedure, respectfully moves the Court to dismiss the complaint the plaintiffs filed herein, because the Court lacks jurisdiction over the subject matter thereof and because said complaint fails to state a cause of action upon which relief may be granted, in that:

1. The guarantees of the Fourteenth Amendment to the United States Constitution do not apply to issues of age, requiring the plaintiffs to state a cause of action under the Age Discrimination in Employment Act, providing statutory remedies, in order to proceed; and

2. The Age Discrimination in Employment Act is inapplicable upon the face of the allegations in plaintiffs' complaint, because:

(a) The plaintiffs failed to exhaust their administrative remedies which are jurisdictional prerequisites to the initiation of suit, and

(b) The Plaintiffs lack standing to sue under the ADEA or to challenge Section 3 of Senate Bill 425, and

(c) The plaintiffs are not employees covered under the Age Discrimination in Employment Act.

In support of this motion, the defendant attaches hereto his suggestions.

(Signatures and certificate of service omitted in printing)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JUDGMENT

No. 89-2360EM

Honorable Ellis Gregory, Jr.;
Honorable Anthony P. Nugent,
Jr.; Honorable Douglas W.
Greene and Honorable Flake L.
McHaney,
Appellants.

vs.

Honorable John D. Ashcroft,
Appellee.

Appeal from the United States
District Court for the
Eastern District of Missouri

This appeal from the United District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

March 5, 1990

A true copy.

/s/ Robert D. St. Vrain, Clerk

ATTEST:

Clerk, U. S. Court of Appeals, Eighth Circuit

MANDATE ISSUED 3/26/90